United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2158

ORIGINAL

To be argued by
ARTHUR T. CAMBOURIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY O. BOYD, SR.,

Petitioner-Appellant,

-against-

ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellee.

Docket No. 76-2158

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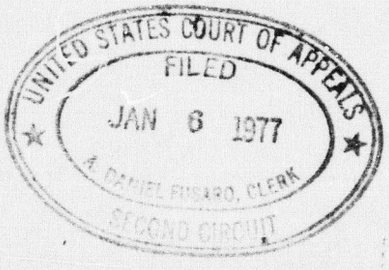
ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether Mrs. Arrington's in-court identification deprived petitioner of his right to due process where the witness made her first identification at a prearranged and grossly suggestive courtroom confrontation 8 1/2 months after the crime and where there remained a substantial likelihood of irreparable mistaken identification.

2. Whether Mrs. Riordan's testimony concerning her pre-trial identification of petitioner deprived him of due process and his right to counsel under the Sixth and Fourteenth Amendments where

   a. The confrontation in criminal court was unnecessarily and impermissibly suggestive.

   b. The criminal court confrontation was secured in violation of petitioner's right to counsel.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from an order of the United States District Court for the Eastern District of New York (The Honorable Walter Bruchhausen) entered on July 23, 1976, dismissing a petition for a writ of habeas corpus.[1] The Honorable Mark Constantino, assigned to the case after the death of Judge Bruchhausen, granted a certificate of probable cause; petitioner filed a timely notice of appeal.

The Honorable Thomas Platt, on June 4, 1976, granted permission to proceed in forma pauperis with William E. Hellerstein, Lawrence H. Sharf and Arthur T. Cambouris of the Legal Aid Society as counsel. The Legal Aid Society continues to represent petitioner on this appeal.

STATEMENT OF FACTS

A. Procedural History

At 3:00 p.m. on June 23, 1971, two intruders forced their way into the duplex apartment of Fredricka Riordan at 43 Joralemon Street in Brooklyn Heights. After Mrs. Riordan and her cleaning woman, Mary Arrington, were locked into a closet, the intruders stole some property and left. Petitioner Boyd was arrested one month later and charged with the crime; the other intruder was never apprehended.

On September 23, 1971 petitioner was indicted in Kings County (No. 5620/71) on charges of first degree robbery, grand larceny in the third degree, and burglary in the second degree (N.Y. Penal Law,

1. Judge Bruchhausen's opinion is B to the separate appendix to appellant's brief; the docket sheet of the District Court is A to that appendix.

Sections 160.15, 155.30, 140.25). Following a pretrial hearing to suppress the identification testimony of both Mrs. Arrington and Mrs. Riordan, the Honorable Benjamin Abrams, on March 8, 1972, ruled that all such identifications, both pretrial and in court, were free of constitutional infirmity.

On May 12, 1972, after trial before the Honorable Louis B. Heller and a jury, petitioner was found guilty as charged in the indictment. He was sentenced by the Supreme Court, Kings County, on September 12, 1972 to an indeterminate prison sentence with a maximum term of ten years on the robbery conviction and lesser concurrent terms on the remaining counts; petitioner is currently incarcerated pursuant to that judgment.

On May 28, 1975, the Appellate Division, Second Department, unanimously affirmed the judgment without opinion (48 A.D. 2d 769), rejecting the constitutional challenges to the eyewitnesses' identification testimony. Leave to appeal to the New York Court of Appeals was denied on June 25, 1975 (Breitel, C.J.). Thereafter, petitioner filed the instant application for a writ of habeas corpus, raising the identification issues considered by the state courts.[2] Judge Bruchhausen dismissed that application on July 23, 1971. In its brief memorandum, the District Court mentioned Mrs. Riordan's testimony and concluded, "the procedures were in conformity with settled law." The court did not refer to Mrs. Arrington's identification. This appeal followed.

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2. The petition for the writ of habeas corpus is C to appellant's separate appendix; the petition includes copies of the orders entered in the state appellate courts.

B. The People's Identification Testimony

The Crime and its Immediate Aftermath

It was about 3:00 p.m. on June 23, 1971, when Mrs. Riordan opened the door to her apartment and found a tall man asking if "Sam" lived there. After a short conversation (approximately 35 seconds) with this man, she attempted unsuccessfully to close the door. The tall man forced the door open, pushing Mrs. Riordan against the wall behind the door; she could, at this point, see only the taller man's profile. As a shorter man followed the taller one into the apartment, Mrs. Arrington, the cleaning woman, ran down the hall (H. 2-4, 12, 13, 45; T. 58-59)[3] to join Mrs. Riordan. The tall man asked two questions the answers to which revealed that there was no one else in the apartment other than the Riordan's child. The taller man then disappeared to the upper level of the duplex. Mrs. Arrington claimed to have seen the taller man for five minutes before he left (H. 4, 13; T. 128-130, 140). With his taller cohort gone, the shorter man asked the women for money and jewelry.[4] He took a wallet but declined to take the jewelry. Eventually, he ushered the two women into a bedroom closet and locked the door (H. 4-5, 14; T. 36-41, 129-132). After waiting about a half hour, the women forced open the closet

3. "H" refers to the minutes of the pretrial identification hearing which are reproduced in full and attached as D to the separate appendix to appellant's brief. "T" refers to the minutes of the tria

4. Unlike Mrs. Riordan, Mrs. Arrington believed the shorter man seized the purse before the taller man disappeared, although she agreed that the subsequent events occurred in the shorter man's presence alone (T. 152, 157-158).

door and ran to a bar across the street (H. 5-6, 46).[5]

Mrs. Arrington conceded that the incident left her "nervous and upset", so much so that after the incident she discontinued her work for Mrs. Riordan out of fright (H. 38, 49). While Mrs. Riordan denied that she was hysterical "at that time or after", it was revealed (at sentencing) that she had "undergone psychiatric treatment" as a result of her experience (H. 23; Minutes of sentencing, dated September 12, 1972, p. 2).

Coincidentally, Vincent Grimaldi, the owner of the bar to which the women fled, had become suspicious when he observed two black men entering and exiting the Riordan residence with merchandise that they loaded into a black Ford. He had jotted down the license plate number, 3136A, which turned out to match that of a car which had been stolen previously. He never had a clear view of the two men's faces. The taller one was approximately 6'2" tall and had a "big hairdo" or large "Afro" (H. 60; T. 110-116, 118-119).

Patrolman Alexander Lazzarino, one of the first officers to respond, questioned the women for descriptions and recorded their answers. Mrs. Riordan characterized the taller man as over six feet tall, "thin and muscular", short Afro haircut, with crooked and discolored front teeth; the shorter man was 5'10" tall. Mrs. Arrington only said that she concurred with Mrs. Riordan (T. 175-179). A short while later and after Mrs. Arrington had left,

5. There is some question whether the women ever saw the taller man again. Arrington said she and Mrs. Riordan were locked in the bedroom closet before the taller man returned (T. 133-138, 158-159), whereas Mrs. Riordan testified that the taller man had returned just before they were ushered into the closet (H. 5, 14-15; T. 40-41, 63).

Riordan described the taller man to Detective Glen J. Fitzgerald; according to his notes, the taller man was 6'2" tall, thin, in his late 20's, long Afro, long sideburns, front teeth discolored, white shirt and dark pants and armed with a silver gun (T. 209, 210-212, 226-227). When the detective interviewed Arrington a few days later, she could only say that the taller one was a male, black, about 6' tall and in his late twenties (T. 212).

Within a week of the robbery, Arrington went to police headquarters where she examined pictures of male black robbery and burglary suspects between 5'8" and 6'4" tall. These pictures were not produced at the Wade hearing and Fitzgerald did not know whether petitioner's picture was among the group shown. Mrs. Arrington did not make an identification from these photos. Mrs. Riordan did not look at any photographs (H. 22-23, 54, 59-60).

Mrs. Riordan's Pretrial Identification

A month after the robbery (July 24, 1971), Patrolman Mervin E. Woike arrested Boyd when he and a woman were found sitting in a stolen car which, it was discovered, was the same car seen by Grimaldi on the day of the robbery (T. 182-184).[6] Boyd was arraigned on the stolen car charge on July 29, 1971, assigned a Legal Aid Society attorney, and asked to return to court on August

6. As Woike described it, the car's motor was not running, and a search of both occupants did not produce registration, a key or any other means to operate the car. Woike also revealed that petitioner explained that the vehicle's owner had been standing at a nearby corner but left upon the officer's approach; since Woike disbelieved this, he never investigated further. The officer believed that petitioner had said he did not know his friend's name, but then pleaded inability to remember whether Boyd had said "Jimmy" (T. 182-184, 189-190, 192-198).

10, 1971 for a preliminary hearing.[7] After Boyd's arrest, Detective Fitzgerald was notified of his description, 32 years old, 6'4" tall, 200 pounds, dark-skinned, and square face, missing and discolored front teeth (H. 60-61); the detective acknowledged that the "missing front tooth" was erroneous (H. 82). Fitzgerald left a message with Mr. Riordan who relayed it to his wife (in St. Louis at the time); he asked her to return home and appear in court on August 10. The detective conceded that he told Mrs. Riordan, after her return and prior to her appearance in court, that a Henry Boyd was to appear in court on a stolen car charge, that this man fit her description of the robber, that he had discolored teeth and that he had been arrested in the stolen vehicle which was used in the robbery (H. 7, 23-26, 39, 62-63, 71).

Mrs. Riordan entered the courtroom on August 10, some seven weeks after the robbery, to see if she could identify Boyd when he appeared on the stolen car charge (H. 7, 62-63). Mrs. Riordan and Detective Fitzgerald sat in the fourth row of the courtroom (H. 68-69; T. 219-220, 225). Fitzgerald stated to her, "when you see the fellow, who did it,-- committed this robbery at your residence --- to let me know" (T. 228-229). Mrs. Riordan observed

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7. Although the witnesses referred to Boyd's court appearance on August 10, as being for purposes of arraignment, an examination of the Criminal Court papers on the stolen car case (Docket No. A 17580/71) reveals that the arraignment was held on July 29, 1971 and the preliminary hearing on August 10. Those papers, as well as Officer Woike's testimony, disclosed that Boyd had gone to trial on the stolen car charge and had been acquitted of petit larceny, acquitted of possession of stolen property in the third degree and convicted only of unauthorized use of a vehicle (N.Y. Penal Law, Sections 155.25, 165.40, 165.05)(T. 190-192).

court personnel and attorneys, readily recognizable as such by their dress. She estimated that over a 20 minute period, 6-8 black defendants (two of whom were Puerto Rican), were produced before she saw and identified Boyd who was standing by himself at the time (H. 7-8, 29; T. 70, 92-105). At trial, the witness revealed that Boyd was the tallest defendant, and no one else she saw approximated his appearance (T. 104). She did not remember hearing Boyd's name called beforehand (H. 26-27).

Detective Fitzgerald, who had never before seen Boyd, insisted that he paid no attention to what was happening in the courtroom until Mrs. Riordan identified Boyd. He estimated that between 7 to 15 defendants whom he could not describe had appeared but conceded that Mrs. Riordan's lower figure could be accurate (T. 229, 232, 235). He also believed that Boyd first appeared together with two other defendants before a uniformed court officer placed him alone against a wall (H. 75-76; T. 239). After the identification, Boyd was paroled to the detective's custody and taken to the precinct where he denied any involvement in the robbery (H. 75-76).

Detective Fitzgerald had notified the district attorney beforehand about Mrs. Riordan's presence and "explained the situation." He did not, however, advise Boyd or his Legal Aid attorney of the identification confrontation although Fitzgerald assumed Boyd was represented (H. 67-68). Although he conceded that a lineup could have been arranged, he explained that he had not done so because his witness might have proved unable to identify the suspect; he later said that he simply had not thought about a lineup (H. 82-83; T. 233).

Three days later, Riordan again saw Boyd when she testified at the preliminary hearing on the robbery charge. Mrs. Arrington arrived too late to see him there, but Mrs. Riordan informed her that she was positive that the police had the right man (H. 36-37, 50).

Mrs. Arrington's Pretrial Identification

The pretrial identification hearing commenced on March 7, 1972. After Mrs. Riordan had testified and identified Boyd, the prosecutor called Mrs. Arrington as his next witness. Before she entered the courtroom, defense counsel objected to her appearance there without first conducting a lineup. Counsel noted that Arrington, in the 8 1/2 months since the incident, had never identified petitioner (either in person or through photographs), that there were no spectators in the courtroom, that Boyd was the only black male, and that Mrs. Arrington already knew that Mrs. Riordan had been positive of her identification of Boyd (H. 40-42). As Arrington later revealed, she also knew that Boyd had been found in the car used for the robbery (H. 52-53). When the Court questioned whether a lineup was feasible, defense counsel pointed out that the detention facilities provided a supply of black defendants in addition to court personnel: moreover, since it was 3:37 p.m., extra personnel from other parts that were closing would also be available (H. 41-43).

Justice Abrams immediately denied the motion on two grounds. First, and in the court's view most important, the application was "immaterial" because Mrs. Riordan's identification was sufficient "to hold this defendant for trial" in any event, and therefore Mrs. Arrington's ability to identify was an insignificant

issue. Second, the court thought a lineup "very difficult" for court personnel to arrange, although he would make them do so if it were important (H. 42-44). Defense counsel took exception on the ground that "this impermissible and unnecessarily suggestive showup" violated due process (H. 44). It was noted for the record that the only people in the courtroom were the defendant, three court officers standing behind him, counsel, the district attorney, the stenographer, clerk and judge (H. 44).

Mrs. Arrington was then called as a witness and identified Boyd (H. 46, 55). At one point, she stated, "I know him. I'm pretty sure I mean from his looks, and I'm pretty sure he remembers me" (H. 48). It was only after the identification that she gave her first detailed description of the taller robber; she said he was very ugly, very dark, he had sideburns and a mustache, and his teeth were "uneven or something" and not "white" (H. 45, 49, 52). Asked if she noticed any scars or facial marks, Mrs. Arrington replied: "I'm going to tell you. I didn't look at his face that close to tell whether there were scars, but I know his mouth. His teeth is not right. I know about his teeth" (H. 51). She acknowledged that, although she had a far greater opportunity to observe the shorter man, she would be unable to identify him (T. 146, 171).

Mrs. Riordan, when called at the hearing, insisted that she had an "excellent visual memory", citing the fact that she had minored in art history when she was in college (H. 30-31). When asked to recall her description to the police, Mrs. Riordan now gave a more detailed and somewhat different description than the one contained in the police officers' notes: she now said that

the taller man had a lean (neither thin nor fat) muscular build, had the beginnings of a mustache, wore light khahi-type pants and sported an Afro hairdo which was not "bushy" (H. 15-20, 38-39; T. 46-47).

C. The Court's Decision Denying the Motion to Suppress the Identifications

At the conclusion of the hearing, defense counsel moved to suppress the pretrial and in-court identifications of both witnesses because of the unduly suggestive circumstances under which the identifications were obtained, the absence of any exigent circumstances, and the lapse of time between the crime and the respective showups. Counsel also argued that Mrs. Riordan's Criminal Court identification was secured in violation of petitioner's right to counsel (T. 85-88). Denying the motion in all respects, Justice Abrams stated:

> The Court finds that the identification made by Mrs. Riordan was such that there's no doubt in the Court's mind that that identification was proper, and there's no doubt in the Court's mind that it was done without violating any of the Constitutional rights of this defendant. That the identification made by Mrs. Riordan in Court was tantamount to a lineup. As a matter of fact, it was even better than a lineup as far as the defendant is concerned. She didn't know who they were going to bring into the courtroom, but the moment she saw this defendant, by a split second she testified, a split second, she knew it was he. So I must deny your motion, Mr. Madden, on the theory that the identification was good by all the witnesses, and that it was done so without violating any of the defendant's constitutional rights. The defendant must stand trial (H. 40).

In response to defense counsel's request for clarification, the court specified that its ruling applied to the pretrial and in-court identifications of both witnesses (H. 90-91).

In a later colloquy with defense counsel, the court stated that the complainant, apparently Mrs. Riordan, "had plenty of time to observe this defendant at the time of the commission of

the crime. In other words, if I were trying this case without a jury there would be no doubt in my mind that her identification was a very, very good identification. Now it's up to you" (H. 93-94). In reference to Mrs. Riordan's pretrial identification, the judge noted, "I don't think there's any suggestibility at all in this case by the police officer. He didn't suggest anything. He just asked her to sit in the courtroom and see if anybody coming out would be this defendant" (H. 94-95). When counsel asked the court to consider the conversations between the police and Mrs. Riordan prior to the identification, the judge added,

> She certainly was coming down to see if one of the men that [sic] was picked up was the defendant, but there was nothing suggestive [sic] that he was the defendant. They didn't know it, and nobody knew whether he was the defendant except the complaining witness. So I don't see any suggestibility at any stage of this case. Not at all (T. 95).

Counsel noted his exception (T. 95).

D. The Trial and Verdict

Trial commenced before the Hon. Louis B. Heller and a jury of May 8, 1972. Mrs. Riordan's Criminal Court identification as well as her in-court identification was elicited initially by the prosecution on direct examination (T. 55-56). Mrs. Riordan recalled having an "immediate visceral reaction" upon seeing Boyd in Criminal Court (T. 75-76). Mrs. Arrington identified Boyd, and the details of the identification hearing confrontation were elicited on cross-examination by defense counsel in an effort to impeach her credibility (T. 142-145, 165). The only other evidence presented was the testimony of the investigating officers (T. 176-179, 206-240), that of Vincent Grimaldi (T. 110-118), and the facts of Boyd's arrest one month after the crime (T. 182-199).

Petitioner did not testify, and no defense witnesses were presented; at the defense's request, Boyd was allowed to exhibit his teeth to the jury (T. 250). The jury returned a guilty verdict on all counts on May 12, 1972 (T. 374-375).

ARGUMENT

POINT I

THE ADMISSION OF MRS. ARRINGTON'S IN-COURT IDENTIFICATION DEPRIVED PETITIONER OF HIS RIGHT TO DUE PROCESS WHERE THE WITNESS MADE HER FIRST IDENTIFICATION AT A PREARRANGED AND GROSSLY SUGGESTIVE COURTROOM CONFRONTATION 8 1/2 MONTHS AFTER THE CRIME AND WHERE THERE REMAINED A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISTAKEN IDENTIFICATION.

The identification testimony of Mrs. Arrington was a direct result of what is perhaps the most suggestive and the most unnecessary of all confrontations--a courtroom showup. The State elicited its identification while petitioner, the only black man in the courtroom, sat with his counsel at a pretrial hearing. This confrontation occurred 8 1/2 months after the crime and just before trial, and involved a witness who never before made any type of identification of petitioner. Since there was a substantial likelihood of irreparable misidentification created by these procedures, it was error to allow the People to utilize the in-court identification which that showup produced.[8]

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8. Contrary to respondent's contentions in the court below [Memorandum of the Attorney General, at 16-20], none of the arguments on this appeal challenge any of the factual findings made by the hearing court on the State level and we accept the facts that appear on the record. The truth is that the State court made no specific findings of fact but merely concluded that the pretrial and in-court identifications of both witnesses were admissible. It is these conclusions respecting the constitutional significance of the facts appearing on the record which we challenge and, of course, there is no presumption of correctness regarding these legal conclusions. See Neil v. Biggers, 409 U.S. 188, 193 n. 3 (1972); United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 800 (2nd Cir.), cert denied, 414 U.S. 924 (1973); cf. 28 U.S.C. §2254(d).

The suggestiveness inherent in a one-to-one confrontation is well-documented. "The practice of showing suspects singly to persons for the purpose of identification and not as part of a lineup has been widely condemned." Stovall v. Denno, 388 U.S. 293, 302 (1967); see United States v. Wade, 388 U.S. 218, 233 (1967); Clemons v. United States, 408 F. 2d 1230, 1241 (D.C. Cir., 1968)(en banc), cert. denied, 394 U.S. 964 (1969). As the Supreme Court recognized, such a confrontation when conducted by the police creates "the suggestion to the witness that the one presented is believed guilty by the police." United States v. Wade, supra at 234. It is clear then that the use of showups at police stations, jail cells, or a prosecutor's office is an impermissibly suggestive means of obtaining an identification. The fact that the showup occurs in a judicial setting cannot, of course, legitimate this procedure. To the contrary, the showup in a courtroom where a defendant is to appear on the very charges of which the identification is sought is the most suggestive of all settings. In such cases, it is as if the prosecutor and the grand jury strengthen the implicit police suggestion that the guilty party has been caught.

This Court has recognized the suggestiveness arising from these courtroom confrontations. In United States v. Kaylor, 491 F. 2d 1127, 1131-1132 (2nd Cir., 1973), mod on other grounds, 491 F. 2d 1133, vacated on other grounds sub nom. United States v. Hopkins, 418 U.S. 909 (1974), it was held that a witness' courtroom identification of a defendant for the first time at trial was a "showup." While the Court went on to uphold the constitutionality of the resulting identification since the government, by its inadvertence,

was unaware of the witness' ability to make an identification until that same witness volunteered this fact at trial, it carefully pointed out that the result may have been different if the prosecutor had prearranged such a confrontation:

> "We emphasize in holding that there was not reversible error here, that there is not the slightest suggestion that the prosecutor was in any way attempting to bring the confrontation about in the fashion that it occurred." Id. at 1132.

Courtroom showups have not escaped the judicial scrutiny and criticism of other courts as well. Smith v. Paderick, 519 F. 2d 70, 74-75 (4th Cir.), cert. denied, 423 U.S. 935 (1975), United States v. Johnson, 461 F. 2d 1165, 1168-1169 (5th Cir., 1972); United States v. Wilkerson, 456 F. 2d 57, 59-60 (6th Cir.), cert. denied, 408 U.S. 926 (1972); People v. Ramos, 52 A.D. 640, 641-645 (2nd Dept., 1976) (dissenting opinion), leave to appeal granted (May 5, 1976). Other decisions have sustained the constitutionality of identification produced by these procedures but only when one of the following factors was present: (a) there was no objection to the confrontation Haberstroh v. Montayne, 493 F. 2d 483, 484-485 (2nd Cir., 1974); United States v. Smith, 473 F. 2d 1148, 1150 (D.C. Cir., 1972); United States v. Hardy, 451 F. 2d 905, 906 (3rd Cir., 1971); United States v. Cole, 449 F. 2d 194, 199-200 (8th Cir., 1971), cert. denied, 405 U.S. 931 (1972) or (b) there was some necessity for the witness' appearance at the proceedings where the identification occurred Baker v. Hocker, 496 F. 2d 615, 617 (9th Cir., 1974)[preliminary hearing]; United States ex rel. Riffert v. Rundle, 464 F. 2d 1348, 1350-1351 (3rd Cir., 1972), cert. denied, 415 U.S. 927 (1974)[same]; Pettet v. United States, 434 F. 2d 105 (6th Cir., 1970)[trial] United States v. Black, 412 F. 2d 687 (6th

Cir., 1969), cert. denied, 396 U.S. 1018 (1970)[trial on related charges].[9]

None of these factors exist in this case and, unlike Kaylor, there is more than a "slight suggestion" that the prosecutor called Mrs. Arrington to the hearing for the very purpose of "testing" her ability to identify Boyd. Counsel did register his timely and continuous objection to the confrontation. In addition, it would appear that the sole reason for Mrs. Arrington's appearance at the hearing was to have her render an identification. The purpose of a pretrial identification hearing is to explore the validity

9. Some of those cases have also mentioned the opportunity of defense counsel to cross-examine the witness after the courtroom identification as a factor in their decision. E.g., Baker v. Hocker, supra, 496 F. 2d at 617; United States v. Hardy, supra, 451 F. 2d at 906. It is significant, however, that none of these cases have upheld the constitutionality of a courtroom showup solely because of the availability of cross-examination. In fact, it is highly unlikely that such a result would accord with the teachings of Wade, where, in discussing the importance of counsel at the pretrial confrontation the Court said:

> "And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." United States v. Wade, supra, 388 U.S. at 235 (emphasis supplied).

These words are particularly germane to the instant case because counsel's opportunity to cross-examine the witness after the identification cannot, on the facts of this case, be seen as an adequate substitute for the opportunity to diffuse the suggestiveness prior to the identification. The right to confront may be an effective weapon in uncovering dishonest testimony but its effectiveness is indeed minimized when used to reveal an honest mistake about the identity of the accused, especially one occasioned by grossly suggestive influences.

of identification procedures already utilized. Since Mrs. Arrington had not rendered any previous identification, her appearance at that hearing, was wholly unnecessary. Absent any other reason for her presence there, and the State has throughout these proceedings offered none, one can only conclude that the prosecutor's only purpose for calling Mrs. Arrington was to render the very identification in question. If the police had arranged such a confrontation, there would be no question as to its unconstitutionality. The prosecutor is held to no less a standard.[10]

The hearing court's principal reason for overruling petitioner's objection to this showup reflected a misconception of the identification hearing's function. The court deemed the application "immaterial" because it intended "to hold this defendant for trial" in any event (H. 42-44) as if this were a preliminary "probable cause" hearing in Criminal Court. See New York Criminal Procedure Law, Sections 180.60, 180.70. At the identification hearing there still remained the question of whether the prosecutor could go to the jury with two identifying witnesses instead of one; far from being immaterial, Mrs. Arrington's ability to identify unaided by extreme suggestion was a crucial consideration, and her ability to make such an identification was in no way affected by what the court believed to be the

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10. The record also fails to disclose any necessity for the type of confrontation employed in this case. If the prosecutor thought Mrs. Arrington could render an identification, he had 7 1/2 months to arrange a lineup, with counsel present, since petitioner was in custody from arrest until the hearing. If that was too much trouble, he could have assembled a fair photographic array and presented it to the witness. There was simply no excuse for a prosecutor interested in justice rather than a conviction to fail to use either of these methods.

other witness' capacity to identify. The court's subsidiary reason, a doubt that a lineup could be arranged without undue inconvenience was never verified in the face of defense counsel's congent argument that a lineup at that hour in the courthouse would not be too difficult to assemble (H. 42-44). In any event if the prosecutor could not be troubled to arrange a lineup for 7 1/2 months, it was not entitled to be rewarded with a showup to prompt an unneeded witness.[11]

This confrontation was as suggestive as it was unnecessary. In fact this showup was even more suggestive than the courtroom showups which have already been the subject of judicial criticism. Before she entered the courtroom, Mrs. Arrington knew that a man had been arrested in the car used in the robbery and that Mrs. Riordan was positive that the police had the right man (H. 50, 52-53). She therefore took the witness stand believing that she would see the man arrested in the get-away car, the man identified by Mrs. Riordan as the robber, and the man who had been formally accused of the robbery. To make matters worse, when she looked around the courtroom there was no choice of suspects. Petitioner was the only black man, he was seated at the counsel table surrounded by three uniformed court officers, and there were no spectators present (H. 44). Under these conditions, Mrs. Arrington's selection of petitioner was not an identification at all but, at

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11. By requesting a lineup, counsel tried to avoid the grossly unnecessary and suggestive influences which surrounded the confrontation to which his client was to be exposed. Accordingly, he was performing the very role assigned to him in United States v. Wade, 388 U.S. 218 (1967). The court, we submit, would have been well advised to follow counsel's request for a lineup, but that nonconstitutional issue is not presented on this appeal.

best, a confirmation of Mrs. Riordan's identification.

The hearing showup not only was unnecessarily suggestive but also was conducive to a substantial likelihood of irreparable misidentification. It is now well-settled that the following factors, among others, are relevant to this determination:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation." Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

With these factors as a guide, the issue in this case is whether Mrs. Arrington "was identifying [Boyd] at trial as the man [who she had seen at the pretrial hearing] or whether she had such a definite image of him in her mind before the unnecessarily suggestive showing, that she was relying on it rather than the [pretrial identification]." United States ex rel. Gonzalez v. Zelker, supra, 477 F. 2d at 801.

No fair balancing of these criteria favor admission of Mrs. Arrington's identification since it is most apparent that she could and did not emerge from the crime with a clear mental image of either assailant. She had but a few, concededly terrifying, seconds to observe the taller man before he went upstairs[12] and according to her testimony, never saw him again. Admittedly, she did not "look at his face that close"(H. 38, 49, 51; T. 133-138, 158-159). Her capacity to make an accurate identification is also undermined by her confessed inability to identify or describe the

12. Since she only heard the taller one ask two quick questions before he disappeared, and never saw him again, her estimate of a five minute view of that man was a gross exaggeration (T. 140).

shorter culprit who was in her presence for a considerably longer time (T. 146, 171). There is also no proof that she utilized those few seconds she did have to make any accurate observations of the robber. She gave no description to the police but merely concurred with her employer's statements and when interviewed alone, gave an exceedingly general description of the tall robber (black, 6', in his late twenties) which would fit thousands of people in this City (T. 175-179, 212). Nor did she make an identification of Boyd at any time between the crime and the confrontation.[13] However vague her image was at the time of the incident, it surely faded in the 8 1/2 months between the crime and pretrial confrontation. At the hearing she offered this less than unequivocal identification, "I know him, I'm pretty sure I mean from his looks, and I'm pretty sure he remembers me" (H. 48). Her apparent certainty at other points (H. 46, 55) was most likely the product of the extraordinary suggestiveness surrounding her initial confrontation and her knowledge that Mrs. Riordan was positive, rather than her own mental image of the robber.

Under these circumstances, it is almost certain that this trial identification is the product of the suggestive pretrial confrontation conducted only 8 weeks earlier and not of her observations at the crime then 10 1/2 months away. "A long interval," as this Court has stated, "between the initial observation at the trial coupled with an improper confrontation a compara-

13. There is also the possibility that the witness saw and did not identify Boyd's picture. A week after the crime Mrs. Arrington was shown but did not select any pictures of male black robbery and burglary suspects, but the police could not state if Boyd's picture was among the selection she viewed (H. 54, 59-60).

tively short time before the witness appears in court enhances the danger that he may be relying on his most recent encounter." United States ex rel. Phipps v. Folette, 428 F. 2d 912, 915 (2nd Cir.), cert. denied, 400 U.S. 908 (1970). The testimony at the hearing provides further proof of the causal link between the pre-trial confrontation and the trial identification. It was only after she saw and identified Boyd in the courtroom that she was able to provide a detailed description of the taller robber, details which fit Boyd but which she had omitted from her vague description to the police. On this record, the State has not sustained its burden of showing that there was no substantial likelihood of mistaken identity following the unnecessarily suggestive confrontation to which Mrs. Arrington was exposed. Brathwaite v. Manson, 527 F. 2d 363, 371 (2nd Cir., 1975), cert. granted, 48 L. Ed. 2d 202 (1976).[14]

The People's other evidence of identification can by no means support an affirmance in this case since it neither removes the likelihood of mistaken identification inherent in Mrs. Arrington's testimony e.g. United States v. Reid, 517 F. 2d 953, 967 (2nd Cir., 1975), or demonstrates that the erroneous admission of her testimony was harmless e.g., United States v. Famulari, 447 F. 2d 1377, 1381 (2nd Cir., 1971). At the outset, it is important to note that the State relied exclusively on the identifi-

14. Even if the hearing court's conclusions may be read as findings with respect to Mrs. Arrington's testimony, that conclusion is entitled to even less weight than its other findings. That conclusion, coming as it did from the very judge who permitted the courtroom identification to occur, is hardly an objective review of the confrontation. In effect, the court merely reaffirmed its own earlier decision overruling defense counsel's objections.

cation testimony of two witnesses to prove their case against Boyd.[15] Saltys v. Adams, 465 F. 2d 1023, 1025 (2nd Cir., 1972). While a jury may have entertained substantial doubts about the identification testimony of each witness, those doubts were easily brushed aside when the prosecutor was permitted to use both witnesses' identifications thereby permitting the two witnesses to corroborate each other. Seen in this light, any error which would deprive the prosecution of identification testimony and weaken this corroborative effect cannot be dismissed as inconsequential.

Without Mrs. Arrington's identification, the jury would be left with the in-court identification testimony of Mrs. Riordan which, as we point out later, was itself improperly bolstered by the admission of her unconstitutional pretrial identification [See POINT II, infra]. More importantly, however, Mrs. Riordan's in-court identification, even properly buttressed by her earlier identification, may have left the jury with a reasonable doubt in view of her limited opportunity to observe and the suggestive influences to which she too had been subjected. Surely, the grave

15. Aside from the testimony of these two witnesses, the State had only a weak and inconclusive piece of circumstantial evidence which was, in any event, too insubstantial to prove that Boyd was the robber. Petitioner was found a month after the crime in the stolen car used by the robbers. There was of course no proof that he had stolen the car, or that he possessed it either at the time of the robbery or the time of his arrest; in fact, petitioner's prompt disclaimer of "ownership" was never investigated by the police. In any event, he was acquitted of charges which accused him of stealing or knowingly possessing the car. Thus while the car is connected to the robbery, there is simply no substantial connection (other than occupancy) between the car and Boyd at the time of arrest and no connection at all between the two at or before the time of the robbery.

problems with her identification would have received closer scrutiny by the jury without Mrs. Arrington's corroborating testimony, and this closer scrutiny may in turn have produced a different result.

In sum, Mrs. Riordan's testimony notwithstanding, there was a substantial likelihood of irreparable mistaken identity and a reasonable possibility that the admission of Mrs. Arrington's testimony contributed to the guilty verdict. See United States v. Russell, 532 F. 2d 1063, 1068-1069 (6th Cir., 1976). The judgment of conviction should be vacated.

POINT II

MRS. RIORDAN'S TESTIMONY CONCERNING HER PRETRIAL IDENTIFICATION OF PETITIONER DEPRIVED HIM OF DUE PROCESS AND HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Mrs. Riordan's Criminal Court Confrontation was Unnecessarily and Impermissibly Suggestive

Even before the State had secured Mrs. Arrington's identification, they had, by the use of the same improper methods, obtained the identification of their other key witness. Aware that a man fitting her earlier description of the robbers was arrested in the stolen vehicle used in the robbery, Mrs. Riordan was called to the courtroom where petitioner was to be arraigned on the stolen car charge. When petitioner, the tallest of the black defendants she had seen, appeared, she identified him as the robber. This confrontation was impermissibly suggestive and its admission on the State's direct case violated due process.

The informal confrontation in which the identifying witness is brought to the courtroom for identification purposes but does not render the identification from the witness stand is, by its nature, a potentially suggestive confrontation. Some decisions have specifically held that such pretrial identifications were unnecessarily suggestive Sanchell v. Parratt, 530 F.2d 286, 292-295 (8th Cir. 1976); United States v. Luck, 447 F.2d 1133 (6th Cir. 1971) and others here stressed the suggestive elements of such informal procedures United States v. Mitchell, 540 F.2d 1163, 1168-1169 (3rd Cir. 1976)(concurring opinion); United States v. Scott, 518 F.2d 261, 266 (6th Cir. 1975); United States v. Roth, 430 F.2d 1137,

1141 (2nd Cir. 1970), cert. denied, 400 U.S. 1021 (1971); Mason v. United States, 414 F.2d 1176, 1180-1181 (D.C. Cir. 1969); Dade v. United States, 407 F.2d 692 (D.C. Cir. 1968). And while it may be possible for an identification rendered in the largely unstructured and unreviewable setting of the courtroom to comport with due process [16], this procedure, is "at least, a practice frought with perils." Clemons v. United States, 408 F.2d 1230, 1240-1241 (D.C. Cir. 1968) (en banc), cert. denied, 394 U.S. 964 (1969).

The "perils" of such courtroom procedures are, of course, realized when there are also suggestive elements to the confrontation itself or to the police discussions with the witness prior to the encounter. The police practice of talking with prospective identification witnesses has been frequently condemned. These conversations between police and witness, the courts have observed, create the inevitable tendency to prompt a witness subconsciously to overcome doubt and to render a factual identification not based entirely on his actual recollection of the perpetrator. Simmons v. United States, 390 U.S. 377, 383 (1968); United States v. Wade, 388 U.S. 218, 233, 234 (1967); Brathwaite v. Manson, 527 F.2d 363, 372

16. Some cases have held that this informal confrontation is not violative of due process but each involved facts not present in the case at bar. Some cases involved a pre-Stovall identification procedure which was judged by a "totality of circumstances" standard United States v. Schartner, 426 F.2d 470 (3rd Cir. 1970); United States v. Black, 412 F.2d 687 (6th Cir. 1969), cert. denied, 396 U.S. 1018 (1970); United States v. Lipowitz, 407 F.2d 597 (3rd Cir.), cert. denied, 395 U.S. 946 (1969); Dade v. United States, 407 F.2d 692, 695 (D.C. Cir. 1968), others found that counsel had not objected to the pre-trial identification procedure and thereby waived the issue United States v. Mitchell, supra; Pettet v. United States, 434 F.2d 105 (6th Cir. 1970)[also a pre-Stovall confrontation], and still others held that there was some justification for the procedure United States v. Scott, supra [the defendant refused to participate in a lineup]. Furthermore, none of these cases challenged the testimony regarding the pre-trial identification but instead sought suppression of the trial identification as tainted by that pretrial confrontation.

(2nd Cir. 1965), cert. granted, 48 L.Ed.2d 202 (1976). The actual confrontation, whether in a lineup or photographic array, must also be free of suggestion so that it does not focus the witness' attention on any one participant in the procedure [17]. United States ex rel. Cannon v. Montayne, 527 F.2d 702 (2nd Cir. 1975). An unfair lineup or array is perhaps even worse than a showup because the witness, unschooled in detection of suggestive influences, naturally would feel "vindicated" by her ability to choose one from several and would be lulled into a hasty selection based on a superficial resemblance of characteristics not shared by the "straw men". See Simmons, supra, 390 U.S. at 383; Wade, supra, 388 U.S. at 232-233; United States v. Fernandez, 456 F.2d 638, 641-642 (2nd Cir. 1972); United States ex rel. Rivera v. McKendrick, 448 F.2d 30, 33-34 (2nd Cir), cert. denied, 404 U.S. 1025 (1971).

The record in this case illustrates how these suggestive elements combined to focus attention on Boyd as he entered the courtroom awaiting a hearing on his stolen car charge. Detective Fitzgerald's conversation with Mrs. Riordan provided the first suggestive influence. She was informed that a man named Henry Boyd, who matched her description and who had been arrested in the car used in the robbery, would be in court that day (H. 7, 23-26, 39, 62-63, 71) and was asked to let the police know "when," not if, "you see the fellow who did it" (T. 228-229). Mrs. Riordan entered

17. When the confrontation occurs in a courtroom it is really not a "lineup" at all. In the courtroom procedure, the "suspects" are seen individually and not together as in a lineup. The individual viewings not only preclude the opportunity for a careful comparison of characteristics of the various suspects but increase the likelihoos that the witness will identify the very first "suspect," or as in this case, the first one who shares some of the characteristics which the witness associates with the actual criminal.

the courtroom fully aware that Boyd would be there and that the police suspected him of the robbery and that the prosecutor had already charged him with crimes related to that robbery [18]. Once in court she could have no difficulty determining who, of the other four to six black men she saw, was the Mr. Boyd she had heard so much about. Riordan conceded at trial that Boyd, the last man she observed,was the tallest of the other four or six black men and was dissimilar in appearance to the others (T. 104). Having told the police that the taller robber was about 6'2" and having been told by them that Mr. Boyd fit her description, Mrs. Riordan, not surprisingly, identified the first tall black man (Boyd is 6'4" tall) she saw (H. 60-61; T. 209-212).

The hearing court's conclusion that the confrontation was "better than a lineup" (H. 40) has no foundation in law or on the record. More importantly, the court did not and indeed could not pass on the issue of suggestiveness since a fact crucial to that argument - Riordan's statement that none of the 4-6 black men were as tall as or looked like Boyd-was only revealed at trial (T. 104). Finally, we do not take issue with the court's finding that Fitzgerald "didn't suggest anything" to Mrs. Riordan. As is obvious from its colloquy with counsel after its decision (H. 94-95), this

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18. As is usually the case with such informal identification procedures held in absence of counsel, the full extent of the suggestion present could not be reconstructed at the pretrial hearing or trial. The record here contains no further description of the other black men. Yet given the information she received beforehand, there were means, other than dissimilarity in appearances, by which Mrs. Riordan would have had her attention impermissibly focused on Boyd. Although she denied hearing Boyd's name called prior to his appearance [H.26], she never stated if she had heard anything about a stolen car charge prior to her identification. Had she heard the charge when the case was called, she would have directed her attention only to the man associated with that charge, especially if the other men appeared on different charges.

conclusion was nothing more than the court's finding that Fitzgerald did not help Mrs. Riordan select Boyd in the courtroom.

There is no justification on this record for resort to such suggestive procedures. Prompt release of an innocent man was not in issue here since petitioner was subject to the jurisdiction of the court on the stolen car charge whether or not he was identified. There was no need to preserve an otherwise fresh memory where the confrontation was to be held almost two months after the crime. There was, as the detective conceded (T. 233), ample time and opportunity to arrange a lineup but none was attempted even though Boyd was in custody for 2 1/2 weeks before the confrontation. Notified beforehand of this confrontation, the prosecutor himself took no action to arrange a less suggestive procedure.

As this Court has recently held, when evidence of an identification rendered at an unnecessarily suggestive pretrial confrontation (occurring after the decision in Stovall) is elicited in the People's direct case, the defendant has been deprived of due process of law. Brathwaite v. Manson, 527 F.2d at 366, 371, and, Smith v. Coiner, 473 F.2d 877, 878-883 (4th Cir), cert. denied, 414 U.S. 1115 (1973). Brathwaite also recognized that the "difference for the prosecution between being allowed to offer evidence of a pretrial identification and being remitted to an in-court identification is substantial", since the earlier identification is more probative than a later one where defendant is seated at the counsel table and since the buttressing of the in-court identification enhances its appearance of reliability." 527 F.2d at 367, n. 6. Hence, under

Brathwaite, admission of evidence of Mrs. Riordan's prior identification taints the judgment, notwithstanding the admission of her in-court identification.

B. The Criminal Court Confrontation was Secured in Violation of Petitioner's Right to Counsel

Petitioner had been assigned counsel upon arraignment on the stolen automobile charge and Detective Fitzgerald correctly assumed that petitioner was represented. Almost two weeks later, with full knowledge of the prosecution but without notification to petitioner or his counsel, Mrs. Riordan rendered her criminal court identification in their unknowing presence. This confrontation violated petitioner's right to counsel under the Sixth and Fourteenth Amendments.

Defendant's counsel's unwitting presence during this identification procedure is as much a deprivation of the right to the effective assistance of counsel as if no lawyer had been present at all. In such a situation, as analyzed in several decisions, counsel is unable to perform either of the important functions which the Supreme Court outlined in United States v. Wade, 388 U.S. 218 (1967). Patler v. Slayton, 503 F.2d 472, 475-76 (4th Cir. 1974); United States v. Roth, 430 F.2d 1137, 1140-41 (2nd Cir. 1970), cert. denied, 400 U.S. 1021 (1971); Mason v. United States, 414 F.2d 1176, 1177-1181 (D.C. Cir. 1969). The "potential substantial prejudice" Wade warned of (388 U.S. at 227) was more than realized in this case. Had he known what was occurring, Boyd's counsel could have assisted in avoiding the suggestiveness which, unchecked by the prosecutor,

did result. Moreover, the defense at trial would not have been at the mercy of Mrs. Riordan's and Detective Fitzgerald's inability to recall the exact appearance of the other defendant's who appeared in court that day. Boyd's ignorance, as well as counsel's, exacerbated the difficulty the defense found at trial when it sought to persuade the jury that Boyd was mistakenly identified because of the previous unlawful suggestion.

Once again this record is completely devoid of any justification for not notifying counsel. The confrontation was conducted long after the robbery, well after the arrest, and speed was not of the essence in enhancing the reliability of a witness' memory. In fact, the assistance of counsel would have entailed negligible or no delay for he was assigned and concededly available. Even if the police could not be expected to notify counsel, there was no excuse for the prosecutor, aware of the procedure, not to inform defense counsel of the dual purpose of his client's criminal court appearance. In this regard, the State's inaction has all appearances of a deliberate deception.

The right to counsel at an identification procedure, established in United States v. Wade, 388 U.S. 218 (1967), attaches to confrontations held at or after the commencement of the adversay proceedings. Kirby v. Illinois, 406 U.S. 682 (1972). The question not decided, however, and perhaps left open [19] is whether a defendant, formally

19. The following careful language from Kirby's plurality opinion suggests that no f·rther limitation on the right to counsel was intended, or at very least, that the question may have intentionally been left open: "before the defendant had been indicted or otherwise formally charged with any criminal offense;" "an identification that took place long before the commencement of any prosecution whatsoever" Id. at 684, 690 (emphasis added).

accused of crime A and represented by counsel, has a right to counsel's presence at confrontations involving a witness to crime B. Cases decided after Kirby provide some guidance in answering this question. In Saltys v. Adams, 465 F.2d 1023 (2nd Cir. 1972) the majority found considerable force in Saltys' contention that once he had retained counsel and was awaiting arraignment on one charge, he was entitled to counsel's presence during a subsequent identification procedure involving witnesses to another (and in that case unrelated) crime for which he had not been formally charged Id. at 1026-1027. Another case, citing Saltys, has expressly held that a person, unlike Saltys, arrested and charged for one crime is entitled to the assistance of counsel at a later identification confrontation on another charge when the circumstances dicate no urgency. Thomas v. Leeke, 393 F. Supp. 282, 286 (D.S.C. 1975) [20]:

After Kirby, a defendant, who has been formally accused of one crime and is represented by counsel, has a right to the presence of that counsel at later prearranged confrontations so long as the authorities can cite no exigent circumstances requiring an immediate confrontation (e.g. on-the-scene or hospital identification confrontation). The right to counsel at an identification confrontation and the irreperable prejudice which may (and in this case did)

20. A footnote to a recent decision contains the following conclusion unsupported by any discussion: "under Kirby only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought requires the presence of counsel." Sanchell v. Parratt, 530 F.2d 286, 290, n. 2 (8th Cir. 1976). As we have mentioned, neither Kirby nor any other case supports this conclusion.

occur due to his absence far outweigh any arguments favoring further restriction of that right, especially where, as here, the State cannot even allege administrative inconvenience for its failure to notify counsel [21]. Therefore, Boyd was entitled to the "knowing" presence of his attorney at the criminal court confrontation.

The right to counsel at identification confrontations must be construed more broadly than the right to counsel in the post-indictment interrogation context. It has been held that a defendant whose right to counsel [established in Massiah v. United States, 377 U.S. 201 (1964)] had attached on one crime, could be interrogated without his counsel if the interrogation concerned a different unrelated offense United States v. Mandley, 502 F.2d 1103 (9th Cir. 1974); United States v. Crook, 502 F.2d 1378, 1379-1380 (3rd Cir. 1974), cert. denied, 419 U.S. 1123 (1975); United States v. Masullo, 489 F.2d 217, 222-223 (2nd Cir. 1973). It is significant, however, that these courts, in rejecting Massiah's applicability to unrelated crimes, stressed the fact that the defendant subjected to interrogation on the unrelated crime is still afforded his Miranda warnings and must voluntarily waive his right to counsel. Mandley, supra, 502 F.2d at 1104; Crook, supra, 502 F.2d at 1378-1379, Masullo, supra 489 F.2d at 222. No such protection is afforded a defendant who has counsel on one charge and is subejcted to a con-

21. As this case graphically demonstrates, the right to counsel at pretrial confrontations is still critical since the police and even the prosecutor are even now, almost 10 years after Wade, arranging confrontations which are highly suggestive and increase the chances of convicting the innocent. The rule in Stovall provides some protection but it is no substitute for the right to counsel who can help remove the suggestiveness before the confrontation occurs and should his attempts fail, recreate that confrontation for use on cross-examination.

frontation on another one; in fact, when the defendant is not even aware of the confrontation, as in this case, he is also denied of the opportunity to request the assistance of his assigned attorney. Beyond all this, the Massiah rule (which preceded the Miranda decision) is now not so much a protection against involuntary confessions as it is a reaffirmation of the sanctity of the attorney-client privilege. The right to counsel guaranteed in Wade, however, is still the first line of defense against identification procedures which can seal a defendant's fate even before counsel is formally assigned. For these reasons, the right to counsel at identification confrontations cannot be restricted in the same manner that it is in the confession area.

Should this Court, however, accept the rule which evolved in the confession area, we submit that, even under that standard, Boyd's right to counsel clearly encompassed Mrs. Riordan's pretrial identification. Following Massiah it has been held, as a corollary to the cases already cited, that a defendant, whose right to counsel has attached on one crime, could not be interrogated, in the absence of such counsel, about another related crime e.g., United States v. Hayles, 471 F.2d 788, 791-793 (5th Cir.), cert. denied, 411 U.S. 969 (1973); People v. Vella, 21 N.Y.2d 249 (1967). This rule, translated into the identification context, states that a defendant, formally accused of one crime has a right to counsel at a subsequent pretrial identification concerning a related charge.

The stolen car charge for which Boyd was represented by counsel and the robbery charge were sufficiently related to require counsel's knowing presence at Mrs. Riordan's confrontation. Whether two crimes

are related for the purposes of the right to counsel depends on the likelihood that a defendant's identification or confession on one will also incriminate him on the other as well. When this likelihood exists, counsel representing the defendant on one charge should be afforded the right to attend any proceeding (interrogation or confrontation) which could produce incriminating evidence on the very charges for which he was assigned. As the police knew from their own investigation, the stolen car in which Boyd was arrested connected him to the Riordan robbery. This fact alone raises the likelihood that an identification of Boyd as the robber would be as incriminating a piece of evidence at his trial for robbery as it would on the stolen car charge. For example, Mrs. Riordan's identification of Boyd as the robber established his dominion and control of the robbery vehicle a month before his arrest in it and closer in time to the theft; this evidence, similar to a confession to the robbery, could have been used as persuasive evidence at trial to prove his theft and possession of stolen property relating to the car. It is also significant that the confrontation, now alleged to be part of an unrelated charge, was arranged not in a police station or prosecutor's office but in the very courtroom where Boyd appeared with his assigned attorney.

There was no excuse for the police and especially the prosecutor to deprive counsel of the opportunity to represent his client at a proceeding which could and did produce incriminatory evidence on the charges to which he had been assigned. If the prosecutor was to allow the appearance of Boyd in criminal court to serve two purposes,

we submit that those purposes were related and that Boyd was entitled to the presence of informed counsel for both.

Whether the right to counsel following the institution of criminal charges extends to that class of identification procedures which we have outlined above or only to those which are related to the charges for which a defendant stands accused, Boyd was denied that right when Mrs. Riordan identified him with counsel present but unable to perform any of the tasks which could assist him. The prosecutor's failure to inform counsel is exacerbated by his apparent indifference to the suggestive circumstances of the police-arranged confrontation. Because the identification in criminal court was obtained in derogation of petitioner's right to counsel, admission of evidence of that pretrial identification by the prosecutor on direct examination was constitutional error.

* * *

Seen as a violation of due process or the right to counsel, admission of Mrs. Riordan's pretrial identification on the People's direct case was error and one which on this record cannot be deemed harmless. A witness' in court identification, even if admissible, cannot cure the error in admitting that witness' testimony concerning his prior unconstitutional identification. Gilbert v. California, 388 U.S. 263, 273-274 (1967)[counsel violation]; Brathwaite v. Manson, 527 F.2d at 367, n. 6 [due process violation]; United States ex rel. Cannon v. Smith, 527 F.2d 702, 705 (2nd Cir. 1975) [same]; See, United States v. Fernandez, 456 F.2d 638, 642 (2nd Cir. 1972). It follows that Mrs. Riordan's in-court identification, even assuming its admissibility, could not render harmless

the error allowing her to testify to her pretrial confrontation. Her trial testimony, delivered almost a year after the crime, would have been severely weakened without the support it received from her earlier identification.

The People's other evidence, even if admissible, is also insufficient to show that the admission of Mrs. Riordan's prior identification was harmless beyond a reasonable doubt. Surely, if Mrs. Arrington's identification is excluded [see Point I, supra], the People's other identification evidence is nonexistent. Assuming arguendo the admissibility of Arrington's testimony, her identification was by no means so free of doubt as to support a case for harmless error. It will be recalled that Arrington was exposed to the taller man for only a few seconds, furnished but a vague description of him, and received her first viewing of Boyd 8-1/2 months after the crime in the most suggestive confrontation imaginable. This is hardly the type of evidence which precludes a reasonable possibility that the jury relied on the erroneously received evidence to arrive at their verdict [22].

22. This case reveals none of the other evidence upon which this Court has relied in finding the admission of an unconstitutional identification harmless error. There was no proof that Boyd possessed any fruits of the robbery e.g. United States ex rel. Frasier v. Henderson, 464 F.2d 260, 263-265 (2nd Cir. 1972); United States ex rel. Spingle v. Follette, 435 F.2d 1380, 1384 (2nd Cir. 1970), cert. denied, 401 U.S. 980 (1971), he made no confessions or admissions e.g., United States ex rel. Davis v. Follette, 410 F.2d 1134 (2nd Cir. 1969); United States ex rel. Cummings v. Zelker, 455 F.2d 714 716 (2nd Cir.), cert. denied, 406 U.S. 927 (1972), there were no fingerprints connecting Boyd to the robbery e.g. United States v. Reid, 517 F.2d 953 (2nd Cir. 1975), no proof of flight at the time of arrest, United States ex rel. Gonzalez v. Zelker, supra. Furthermore, if proof that defendant had rented the vehicle used in the robbery is not probative enough to support a finding of harmless error United States ex rel. Robinson v. Zelker, 468 F.2d 159, 165 (2nd Cir. 1972), cert. denied, 411 U.S. 939 (1973), then certainly Boyd's arrest a month after the crime in the car used in the robbery is even less probative especially since he was acquitted of possession and theft of that vehicle.

One question still remains: whether Mrs. Riordan's in-court identification was admissible. We submit that a hearing is required to answer that question since "there is evidence in the record that would justify a finding either way on the issue of independent source, but it will be recalled that the State has the burden of proof...." United States ex rel. Robinson v. Zelker, supra, 468 F.2d at 164; Cf. Brathwaite v. Manson, supra, 527 F.2d at 371.

Mrs. Riordan's opportunity to fix an image of the taller man was exceedingly brief. She initially saw the taller man at the door for an estimated 35 seconds, but only became suspicious of his purpose toward the end of that period. Thereafter she was pushed behind the door and could merely see his profile while he asked two questions before disappearing upstairs. Whether she ever saw that taller man again is unresolveable on the record due to the conflicting testimony and the state court's failure to make factual findings. Even if she did, it must have been for a very brief period for she testified that the shorter man already was leading her to the bedroom when the taller one returned.

Her first viewing of the petitioner came seven weeks after the crime under the extremely suggestive circumstances detailed earlier. She never was afforded a valid selection among tall men, and, having been apprised of all the facts which the detective possessed, undoubtedly arrived in Criminal Court secure in the belief that the police had the right man and that she would identify him. Even her purported certainty of identification, appears to be more a trait of character, or a product of her eagerness to vindicate herself, than an indication of reliability. For example, while she

was certain of her description of the taller man, her account of that description at the hearing contained details which were different than or omitted from her earlier description to the police. She was as certain that she was not hysterical during the crime but the sentencing minutes appear to contradict that claim. Given her desire to appear positive about everything, once Mrs. Riordan identified Boyd it was not only "unlikely" but virtually inconceivable that she would "go back on [her] word later on" United States v. Wade, 388 U.S. 218, 229 (1967).

Finally, a hearing would also help develop the significance of evidence which was only revealed after the hearing and trial. The court at sentencing noted that Mrs. Riordan had been "traumatically "affected" and required "psychiatric treatment" as a result of her experience. This fact was inconsistent with Mrs. Riordan's testimony and could have had a profound effect upon any determination of her ability to observe and to recall the robber's features uninfluenced by suggestion or feelings of vengeance. The state court's profession of confidence in Mrs. Riordan carries no weight. Since the court concluded that the criminal court confrontation was "even better than a lineup," naturally it found no difficulty with the admission of Mrs. Riordan's in-court identification.

For these reasons, a hearing must be held to determine the admissibility of Mrs. Riordan's in-court identification. It is, however, unnecessary for the federal courts to conduct such a hearing since, as we stated earlier, the conviction must be vacated if this Court agrees with either one of our assignments of error.

Accordingly, the writ should issue with a direction to the State courts to conduct the hearing with respect to Riordan's in-court identification prior to the commencement of any new trial.

Should this Court disagree and conclude that one or both of the errors can be characterized as harmless unless Mrs. Riordan's trial identification is excluded, petitioner respectfully requests that this case be remanded for hearing in the District Court. If, at the conclusion of the hearing, her trial testimony is ruled inadmissible, there could be no claim of harmless error since she was the People's principle witness and a conviction without her testimony is most unlikely and perhaps legally impossible due to insufficient evidence.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE GRANTED, THE JUDGMENT VACATED, AND PETITIONER ORDERED RELEASED FROM CUSTODY UNLESS THE STATE PROMPTLY MOVES TO RETRY HIM AND A NEW TRIAL IS CONDUCTED IMMEDIATELY THEREAFTER.

Respectfully submitted,

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